

**United States Department of Labor
Employees' Compensation Appeals Board**

E.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baltimore, MD, Employer**

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**Docket No. 10-1958
Issued: July 7, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2010 appellant timely appealed the July 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which reduced his compensation. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective August 1, 2010 for failing to cooperate with vocational rehabilitation.

¹ 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

This case was previously before the Board. Appellant, a 63-year-old former letter carrier, has an accepted claim for right hand contusion and lumbar spine contusion.² His injury occurred July 16, 1984 when he fell while attempting to flee six dogs that attacked him. Appellant's 1984 traumatic injury claim has a lengthy procedural history, including numerous prior appeals dating back more than two decades.³ The Board issued its most recent prior decision on November 21, 2008.⁴ One issue on appeal was whether appellant received an overpayment of \$33,003.07. The second issue pertained to his July 14, 2006 claim for recurrence of disability. The Board reversed OWCP's finding with respect to the \$33,003.07 overpayment. As to the recurrence claim, the Board remanded the case to OWCP for a determination of whether modification of a September 29, 1994 wage-earning capacity determination was warranted.⁵ On remand OWCP modified the September 29, 1994 LWEC determination. Effective April 12, 2009, it adjusted appellant's periodic rolls payments to reflect entitlement to wage-loss compensation for total disability.⁶

In April 2009, OWCP referred appellant for vocational rehabilitation based on the March 27, 2009 work capacity evaluation (Form OWCP-5c) of Dr. Jeannine M. Leadbeater, a Board-certified family practitioner, who imposed a four and a half-hour limitation with respect to sitting, walking, standing, reaching and reaching above shoulder. Dr. Leadbeater also imposed a two and a half-hour limitation on operating a motor vehicle at work. Additionally, appellant was limited to two and a half hours pushing with a 30-pound weight restriction. He was allowed to pull 20 pounds and lift 30 pounds. Lastly, Dr. Leadbeater restricted appellant to two hours squatting and two and a half hours kneeling.⁷

² Appellant has a history of lumbar degenerative disc disease and has undergone several surgical procedures, most recently on January 5, 2005.

³ Docket Nos. 90-1201, 92-1525, 95-1488, 03-1105 and 07-2266.

⁴ Docket No. 07-2266. The Board's November 21, 2008 decision is incorporated herein by reference.

⁵ OWCP previously reduced appellant's compensation based on his actual earnings as a mail clerk effective November 4, 1990. In a prior appeal, the Board affirmed OWCP's September 29, 1994 loss of wage-earning capacity (LWEC) determination (Docket No. 95-1448). On subsequent appeal, the Board affirmed OWCP's March 11, 2003 decision denying modification of the September 29, 1994 LWEC determination (Docket No. 03-1105).

⁶ OWCP also paid appellant compensation for total disability retroactive to March 19, 2006.

⁷ The limitations were ostensibly based on an "attached functional capacity evaluation," but no such information was attached to the March 27, 2009 Form OWCP-5c. Dr. Leadbeater imposed similar restrictions in a February 22, 2008 Form OWCP-5c. The previous year's work capacity evaluation included an additional two and a half-hour limitation on bending/stooping, but no specific restriction with respect to operating a motor vehicle at work.

Appellant initially met with his OWCP-designated rehabilitation counselor on June 1, 2009. OWCP subsequently assigned another counselor, with whom appellant met on July 16, 2009. The rehabilitation counselor developed a plan for private placement.⁸ The identified positions included Correctional -- Treatment Specialist, Social Worker, Delinquency Prevention and teacher aide 1.⁹ OWCP's rehabilitation specialist approved the job placement plan on September 25, 2009 and a copy of the plan was forwarded to appellant for his signature.

On November 6, 2009 OWCP advised appellant that it proposed to reduce his compensation because the medical and factual evidence established that he was no longer totally disabled, but rather was partially disabled. It further explained that, based on the previously identified positions, he had the capacity to earn wages ranging from \$263.46 to \$500.00 per week. Appellant was to receive 90 days of job placement assistance and during that period his compensation would not be reduced. Lastly, OWCP informed him that, if he disagreed with the proposal, he could submit additional evidence or argument relevant to his capacity to earn wages in the selected positions. Any such information was to be submitted prior to the expiration of the 90-day job placement period.

On November 25, 2009 appellant received medical treatment for chronic low back pain. Dr. Tarsha J. Darden, a Board-certified family practitioner, noted a history of a job-related injury at age 18 and a subsequent back injury in 1984. She also noted that appellant had already undergone three back surgeries and had been recommended for a fourth. Appellant reportedly had been doing exercises for low back pain three weeks prior and his pain had worsened since then. He rated his pain at 7 out of 10. The pain was limited to appellant's low back and did not radiate down his legs. Dr. Darden also noted that, based on a previous magnetic resonance imaging scan, appellant had been told he needed additional back surgery. Appellant's current pain was severe and she advised that he follow-up with an orthopedist. Dr. Darden's assessment was chronic low back pain. She prescribed Flector patches for pain and referred appellant to an orthopedist.

In a December 2, 2009 progress report, the rehabilitation counselor advised OWCP that appellant failed to sign the rehabilitation plan, failed to provide requested references, failed to complete a job skills questionnaire and failed to provide his college transcripts or other relevant information that would facilitate the development of a résumé. He also indicated that appellant had not provided job search logs or other documentation of his job search activities. The rehabilitation counselor further noted that of the approximate 30 job leads he provided appellant had not applied for any of the available positions. Appellant reportedly had been completely dismissive of the rehabilitation counselor's efforts to help him find suitable employment.

⁸ Appellant expressed interest in returning to his prior position as a letter carrier and in fact, he pursued such reemployment efforts independent of the rehabilitation counselor. However, his former employer was either unwilling or unable to accommodate his wishes. Notwithstanding appellant's approximate 25-year absence from work, he argued to no avail that he had civil service retention rights pursuant to 5 U.S.C. § 8151(b). Appellant had voluntarily resigned from the employing establishment effective September 14, 1984. As an alternative to returning to his former letter carrier duties, he wanted OWCP to authorize his pursuit of a Master's degree in Ministry. Appellant already held two Bachelor's degrees therefore additional training for the ministry was not considered justified in light of the availability of jobs appellant was currently qualified to perform.

⁹ Appellant previously worked as a substitute teacher.

On December 14, 2009 OWCP advised appellant that it had been informed that he discontinued good faith participation in OWCP-approved job placement program. It instructed him to either resume a good faith effort with job placement services or provide a good reason for not doing so. If appellant did not take the necessary steps within 30 days, OWCP explained that it would terminate rehabilitation services and reduce his compensation based on the previously identified positions.

Appellant met with a prospective employer on December 17, 2009. However, it did not result in an offer of employment. The prospective employer was reportedly drawn into a debate between appellant and the rehabilitation counselor about previous efforts to return him to work with his former employer.

Appellant wrote to OWCP on several occasions complaining about the rehabilitation program and how he had not agreed with the rehabilitation counselor about the job leads that had been provided. He claimed he was unqualified for some of the identified positions. Apart from the December 17, 2009 contact with a prospective employer, appellant did not otherwise resume participation with the job placement program. Effective March 8, 2010, OWCP terminated its rehabilitation efforts due to appellant's failure to cooperate.

A May 11, 2010 OWCP e-mail contains a position description for a "Teacher[s] Assistant." The only physical requirement noted for this position is the ability to lift up to 40 pounds.

On June 3, 2010 OWCP issued a notice of proposed reduction. It advised appellant of its intent to reduce his compensation based on his ability to earn weekly wages of \$263.46 as a teacher's aide 1. OWCP explained that Dr. Leadbeater's March 27, 2009 report of examination established that he was partially disabled as a result of the employment injury. It indicated that the permanent restrictions identified in the March 27, 2009 report were accepted as the best representation of his current work capabilities. The notice further explained that appellant failed to cooperate with job placement assistance and that he had been warned of the consequences of his actions by letter dated December 14, 2009. OWCP indicated that, because the rehabilitation process had progressed beyond the initial phase, he would be rated based on a position for which he was both physically and vocationally suited. Appellant was afforded 30 days to submit additional evidence or argument.

Appellant subsequently challenged OWCP's reliance on a March 2009 medical report. He noted that his back went out in November 2009 and at that time he had been referred to orthopedist. Appellant resubmitted Dr. Darden's November 25, 2009 treatment notes. He also submitted a June 17, 2010 treatment request from Dr. Leadbeater, who referred him to an orthopedic surgeon for evaluation of chronic back pain. Dr. Leadbeater made a similar referral six months earlier.

By decision dated July 7, 2010, OWCP reduced appellant's compensation effective August 1, 2010 for failure to cooperate with vocational rehabilitation. It found that the teacher's aide 1 position was both medically and vocationally suitable and appellant had not submitted evidence sufficient to alter the prior recommendation to reduce his benefits. OWCP further indicated that, because he elected not to participate in the job seeking phase of the vocational

rehabilitation program, his compensation would be adjusted based on his ability to earn wages as a teacher's aide 1.

LEGAL PRECEDENT

OWCP may direct a permanently disabled employee whose disability is compensable to undergo vocational rehabilitation.¹⁰ If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, OWCP after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual.¹¹ Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation.¹² OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process.¹³ The reduction will remain in effect until such time as the employee acts in good faith to comply with OWCP's directive.¹⁴

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.¹⁵ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁶ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to post-injury or subsequently acquired conditions.¹⁷

ANALYSIS

Once OWCP has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.¹⁸ It reduced appellant's compensation based on his ability to earn wages as a teacher's aide 1. The Board finds that the reduction in compensation was inappropriate, based upon the medical evidence of record.

¹⁰ 5 U.S.C. § 8104(a).

¹¹ *Id.* at § 8113(b).

¹² 20 C.F.R. § 10.519(a) (2010).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *M.A.*, 59 ECAB 624, 631 (2008).

¹⁶ *Id.*

¹⁷ *N.J.*, 59 ECAB 171, 176 (2007).

¹⁸ *Supra* note 15.

It is clear that appellant did not cooperate with the vocational rehabilitation process. As noted, however, OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.¹⁹ The medical evidence OWCP relies upon must provide a detailed description of appellant's condition and the evaluation must be reasonably current.²⁰ In this instance, OWCP relied upon a March 27, 2009 work capacity evaluation from Dr. Leadbeater.

Initially, Dr. Leadbeater checked the appropriate box indicating that appellant could perform his usual job. She then indicated that he was unable to perform his usual job, but could work eight hours with restrictions. These restrictions included a four and a half-hour limitation with respect to sitting, walking, standing, reaching, reaching and a 30-pound lifting restriction. Although Dr. Leadbeater identified various work restrictions, she did not provide a specific diagnosis or a detailed description of appellant's condition. The record does not include a contemporaneous narrative medical report from her. In fact, Dr. Leadbeater appears not to have provided any narrative medical reports or a reasonably current evaluation. Her March 27, 2009 OWCP-5c referenced an attached functional capacity evaluation (FCE). No such attachment was provided. However, the record includes the results of a January 29, 2008 FCE prepared by Kevin P. Schrack, a physical therapist. It is not entirely clear whether this prior FCE formed the basis of the March 27, 2009 work restrictions. In any event, the results were dated and the record does not include evidence indicating that Dr. Leadbeater had recently examined appellant at the time she prepared the March 27, 2009 OWCP-5c.

Furthermore, there is no indication of record that Dr. Leadbeater reviewed a position description for a teacher's aide 1 and therefore there is no medical evidence of record that appellant could actually perform the physical requirements of this position. The Board notes that the May 11, 2010 OWCP e-mail, which contained a position description for a teacher's assistant did not list the physical requirements of the position, other than noting that lifting up to 40 pounds was required. Dr. Leadbeater's restrictions included a lifting restriction of 30 pounds and also included substantial restrictions on sitting, walking and standing. As the record lacks a position description which includes a complete description of the physical requirements of the teacher's aide position, the record does not substantiate that appellant can perform this position.

Accordingly, the Board finds that the more recent evidence of record, particularly the March 27, 2009 OWCP-5c does not adequately establish appellant's current medical condition, including both preexisting and injury-related conditions. The Board also finds that OWCP has not established that he can perform the physical requirements of the teacher's aide 1 position. As such, OWCP improperly reduced appellant's compensation on the basis that the teacher's aide 1 position was both medically and vocationally suitable.

CONCLUSION

The Board finds that OWCP failed to satisfy its burden in reducing appellant's wage-loss compensation for failure to cooperate with vocational rehabilitation effective August 1, 2010.

¹⁹ *Id.*

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board